

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LARVESTER J. JOHNSON, JR.,

Plaintiff,

v.

RON HARRIS, et al.,

Defendants.

Case No. [17-cv-04053-WHO](#) (PR)

ORDER OF SERVICE;

**ORDER DIRECTING DEFENDANTS
TO FILE A DISPOSITIVE MOTION
OR NOTICE REGARDING SUCH
MOTION;**

INSTRUCTIONS TO CLERK

INTRODUCTION

Plaintiff Larvester Johnson has stated due process and Eighth Amendment claims against his jailors at the Maguire Correctional Facility (MCF). The Court directs defendants to file in response to the complaint a dispositive motion, or notice regarding such motion, on or before **October 22, 2018**, unless an extension is granted. The Court further directs that defendants comply with the notice provisions detailed in Sections 2.a and 10 of the conclusion of this order.

PROCEDURAL BACKGROUND

This 42 U.S.C. § 1983 civil rights action was dismissed because Johnson failed to keep the Court apprised of his current address. His motion to reopen was denied because failed to file a proper amended complaint. (Dkt. No. 14.) Plaintiff since has filed a proper

amended complaint. (Dkt. No. 22.) Accordingly, this action is REOPENED and the Clerk is directed to modify the docket accordingly. The judgment and the order of dismissal are VACATED. (Dkt. Nos. 10 and 11.)

DISCUSSION

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. *See id.* § 1915A(b)(1), (2). Pro se pleadings must be liberally construed. *See Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988).

A “complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting *Twombly*, 550 U.S. at 556). Furthermore, a court “is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

B. Legal Claims

Johnson alleges that in 2017, MCF “mental health doctors” (i) Ron Harris, (ii) Gina Phillips, (iii) Elizabeth Alvarez, and (iv) Jordanos Tela, forced him to wear a suicide-

1 prevention suit (a “Ferguson gown”) without providing due process and in violation of the
2 Eighth Amendment.¹ When liberally construed, Johnson has stated due process and Eighth
3 Amendment claims against defendants. His claims of conspiracy and of municipal liability
4 are DISMISSED as conclusory.

5 Defendant Maguire Correctional Facility is DISMISSED. The Clerk shall add
6 Harris, Phillips, Alvarez, and Tela as defendants.

7 **MOTION FOR THE APPOINTMENT OF COUNSEL**

8 Johnson moves for the appointment of counsel. (Dkt. No. 21.) The decision to
9 request counsel to represent an indigent litigant under 28 U.S.C. § 1915 is within “the
10 sound discretion of the trial court and is granted only in exceptional circumstances.”
11 *Franklin v. Murphy*, 745 F.2d 1221, 1236 (9th Cir. 1984). A finding of “exceptional
12 circumstances” requires an evaluation of the likelihood of the plaintiff’s success on the
13 merits and an evaluation of the plaintiff’s ability to articulate his claims pro se in light of
14 the complexity of the legal issues involved. *See Agyeman v. Corrections Corp. of*
15 *America*, 390 F.3d 1101, 1103 (9th Cir. 2004). Neither the need for discovery, nor the fact
16 that the pro se litigant would be better served with the assistance of counsel, necessarily
17 qualify the issues involved as complex. *See Rand v. Rowland*, 113 F.3d 1520, 1525 (9th
18 Cir. 1997).

19 In the Ninth Circuit, roughly one-third of new civil litigants in district court are not
20 represented by counsel. United States Courts for the Ninth Circuit, 2017 Annual Report 40
21 (2018), available at [https://www.ca9.uscourts.gov/judicial_council/publications/](https://www.ca9.uscourts.gov/judicial_council/publications/AnnualReport2017.pdf)
22 *AnnualReport2017.pdf*. Most, but by no means all, of these litigants are incarcerated.
23 There is no doubt that not having a lawyer puts a party at a disadvantage in our adversarial
24 system of justice, and the high percentage of civil litigants who cannot afford one threatens
25 our ability to dispense equal justice to rich and poor alike, as the judicial oath demands.
26 That said, I am compelled to follow controlling precedent and determine if “exceptional
27

28 ¹ Johnson claims defendants violated his equal protection rights, but the Court construes
his claims as falling under due process.

1 circumstances” exist to appoint counsel in the cases before me.

2 At least at this stage of the proceedings, Johnson has not shown that exceptional
3 circumstances exist. His filings are reasoned and sufficiently clear, and the suit does not
4 present complex legal issues. Accordingly, Johnson’s motion for the appointment of
5 counsel is DENIED. When I review a motion for summary judgment in this case, and can
6 evaluate Johnson’s likelihood of success on the merits, I will reconsider the necessity of
7 appointing counsel.

8 CONCLUSION

9 For the foregoing reasons, the Court orders as follows:

10 1. The Clerk of the Court shall issue summons and the United States Marshal
11 shall serve, without prepayment of fees, a copy of the operative complaint in this matter
12 (Dkt. No. 22), all attachments thereto, and a copy of this order upon Ron Harris, Gina
13 Phillips, Elizabeth Alvarez, and Jordanos Tela at the Maguire Correctional Facility. The
14 Clerk shall also mail courtesy copies of the operative complaint and this order to the
15 California Attorney General’s Office.

16 2. On or before **October 22, 2018**, defendants shall file a motion for summary
17 judgment or other dispositive motion with respect to the claim(s) in the complaint found to
18 be cognizable above.

19 a. If defendants elect to file a motion to dismiss on the grounds plaintiff
20 failed to exhaust his available administrative remedies as required by 42 U.S.C.
21 § 1997e(a), defendants shall do so in a motion for summary judgment, as required by
22 *Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014).

23 b. Any motion for summary judgment shall be supported by adequate
24 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
25 Civil Procedure. Defendants are advised that summary judgment cannot be granted, nor
26 qualified immunity found, if material facts are in dispute. If any defendant is of the
27 opinion that this case cannot be resolved by summary judgment, he shall so inform the
28 Court prior to the date the summary judgment motion is due.

1 3. Plaintiff's opposition to the dispositive motion shall be filed with the Court
2 and served on defendants no later than forty-five (45) days from the date defendants'
3 motion is filed.

4 4. Defendants shall file a reply brief no later than fifteen (15) days after
5 plaintiff's opposition is filed.

6 5. The motion shall be deemed submitted as of the date the reply brief is due.
7 No hearing will be held on the motion unless the Court so orders at a later date.

8 6. All communications by the plaintiff with the Court must be served on
9 defendants, or defendants' counsel once counsel has been designated, by mailing a true
10 copy of the document to defendants or defendants' counsel.

11 7. Discovery may be taken in accordance with the Federal Rules of Civil
12 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local
13 Rule 16-1 is required before the parties may conduct discovery.

14 8. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the
15 court informed of any change of address and must comply with the court's orders in a
16 timely fashion. Failure to do so may result in the dismissal of this action for failure to
17 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

18 9. Extensions of time must be filed no later than the deadline sought to be
19 extended and must be accompanied by a showing of good cause.

20 10. A decision from the Ninth Circuit requires that pro se prisoner-plaintiffs be
21 given "notice of what is required of them in order to oppose" summary judgment motions
22 at the time of filing of the motions, rather than when the court orders service of process or
23 otherwise before the motions are filed. *Woods v. Carey*, 684 F.3d 934, 939-41 (9th Cir.
24 2012). Defendants shall provide the following notice to plaintiff when they file and serve
25 any motion for summary judgment:

26 The defendants have made a motion for summary judgment by which they
27 seek to have your case dismissed. A motion for summary judgment under
28 Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your
case.

Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact — that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the defendants' declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted, your case will be dismissed and there will be no trial.

Rand v. Rowland, 154 F.3d 952, 962-63 (9th Cir. 1998).

11. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the court informed of any change of address and must comply with the court's orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

12. The action is REOPENED. The Clerk shall modify the docket accordingly.

13. Defendant Maguire Correctional Facility is DISMISSED.

14. The Clerk shall add Ron Harris, Gina Phillips, Elizabeth Alvarez, and Jordanos Tela as defendants.

15. Johnson's motion for the appointment of counsel is DENIED. (Dkt. No. 21.)

16. The Clerk shall terminate Dkt. No. 21.

IT IS SO ORDERED.

Dated: July 16, 2018



WILLIAM H. ORRICK
United States District Judge